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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY,
Petitioner,

v.

CHESTER DEAN KISER,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

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March 11, 1968

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CHESTER DEAN KISER,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

Petitioner, Missouri-Kansas-Texas Railroad Company, respectfully prays that a writ of certiorari be issued to review the opinion and judgment of the Supreme Court of the State of Oklahoma in Case No. 40808, entitled "Missouri-Kansas-Texas Railroad Company versus Chester Dean Kiser", entered September 12, 1967 and to review the orders of said Court entered November 7, 1967 and January 26, 1968, denying your petitioner's petition for rehearing and second petition for rehearing, as amended.

OPINION BELOW

The opinion of the Supreme Court of Oklahoma (Appendix A attached hereto) has not yet been reported.* The orders of the Court denying the said petitions for rehearing are attached hereto (Appendices B and E).

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* The opinion was written by three attorneys, called "Special Masters", who were "appointed by the court". The Chief Justice

JURISDICTION

The judgment of the Supreme Court of Oklahoma was entered on September 12, 1967, its denial of petitioner's first petition for rehearing was entered November 7, 1967, and its denial of petitioner's second petition for rehearing, as amended, filed following grant of leave to file, was entered January 26, 1968. The court below, by order entered February 5, 1968, stayed enforcement of the mandate pending petition for review by this Court. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C., Section 1257(3).

This Court has jurisdiction to grant certiorari for the following reasons:

1. The Supreme Court of Oklahoma has denied to petitioner, Missouri-Kansas-Texas Railroad Company, the equal protection of the law guaranteed to it by the Fourteenth Amendment to the Federal Constitution by applying Section 126 of Title 66 of the Oklahoma Statutes one way as to petitioner and in a diametrically opposite way to other railroad companies under the same or similar circumstances, which has resulted in a judgment of liability under said statute against petitioner and judgments of no liability under said statute as to such other railroad companies.

2. The Supreme Court of Oklahoma has denied to petitioner the due process of law guaranteed to it by the Fourteenth Amendment to the Federal Constitution by

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then assigned the case to Justice McInerney "for review and study" after which and "upon consideration by the court", the opinion was "adopted" per curiam. (Appendix A). There is no constitutional or statutory authority in the State of Oklahoma for the appointment of "Special Masters" or the farming out to them, for "a preliminary advisory opinion", any litigation pending before the Oklahoma Supreme Court. Such procedure is itself a denial of due process, which includes the right of litigants to have their cases decided solely by the justices of the Oklahoma Supreme Court, who are elected for that purpose.

affirming a judgment against petitioner upon a finding which is totally unsupported by any evidence in the record.

3. The discriminatory application of the state statute by the Supreme Court of Oklahoma has rendered said statute invalid under the Fourteenth Amendment to the Federal Constitution, and the judgment against petitioner based upon such invalid statute is likewise invalid.

This Court manifestly has jurisdiction to review such arbitrary and discriminatory action of the Supreme Court of Oklahoma, and to set aside its judgment. This salutary action will serve as an admonition to all state courts that the equal protection and due process guarantees of the Fourteenth Amendment to the Federal Constitution must be followed in the administration of justice.*

QUESTIONS PRESENTED

The judgment against defendant entered in the court below raises three separate but related questions with respect to rights guaranteed to petitioner under the Fourteenth Amendment to the Constitution of the United States. These questions are stated separately:

ONE. Whether the Supreme Court of Oklahoma did deny to petitioner, Missouri-Kansas-Texas Railroad Com-

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* The Federal Constitutional questions here presented were raised on petition for rehearing, as amended, which the Oklahoma Supreme Court "considered and denied" (Appendices C, D and E). When, as here, an aggrieved party is informed for the first time of a change in the consistent application of a state statute by the opinion of the state appellate court adversely finding against the aggrieved party in a manner wholly different from the application of said statute to all others similarly situated, then this Court has recognized that a petition for rehearing presents the first available opportunity for properly raising such federal questions: *Saunders* v. *Shaw*, 244 U.S. 317, 320; *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U.S. 673, 677; and *Missouri ex rel* v. *Gehner*, 281 U.S. 313, 320.

pany, the equal protection of the law guaranteed to it by the Fourteenth Amendment to the Federal Constitution when it applied Section 126 of Title 66 of the Oklahoma Statutes to petitioner in a way diametrically opposite to its application of that same statute to all other railroad companies under the same or similar circumstances, which has resulted in a judgment of liability under said statute against petitioner and judgments of no liability under said statute as to such other railroad companies?

TWO. Whether the Supreme Court of Oklahoma did deny to petitioner the due process of law guaranteed to it by the Fourteenth Amendment to the Federal Constitution when it affirmed a judgment against petitioner upon a finding which is not supported by any evidence in the record?

THREE. Whether the above described application of the state statute by the Supreme Court of Oklahoma renders said statute invalid under the Fourteenth Amendment to the Federal Constitution, and whether the judgment against petitioner based upon such statute, as so applied, is likewise invalid?

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitution of the United States, Amendment XIV, Section 1:

> "* * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Petitioner, a railroad company operating in the State of Oklahoma as well as in the States of Missouri, Kansas and Texas, was the defendant against which a civil ac-

tion was brought by plaintiff Kiser in the District Court of Bryan County, Oklahoma, to recover damages for personal injuries sustained by plaintiff in a crossing accident at Colbert, Oklahoma on January 13, 1961. The only issue on which plaintiff submitted evidence was whether petitioner had complied with the requirements of Title 66, Oklahoma Statutes, Section 126. This statute provides:

> "Sec. 126. *Bells and Whistles*
>
> "A bell of at least thirty pounds weight, or a steam whistle, shall be placed on each locomotive engine, and shall be rung or whistled at the distance of at least eighty rods from the place where the said railroad shall cross any other road or street, under a penalty of fifty dollars for every neglect, to be paid by the corporation owning the railroad, one-half thereof to go to the informer, and the other half to the State, and shall also be liable for all damages which shall be sustained by any person by reason of such neglect."

The language of this Oklahoma statute specifically provides that a railroad has the alternative duty of *either* blowing a whistle *or* ringing a bell as warning of the approach of its train, and unless plaintiff shows by evidence that NO warning, *neither* bell *nor* whistle, was given, plaintiff shall not recover under this statute against defendant. All the decisions of the Supreme Court of Oklahoma, prior to the decision in this case, have so applied this statute over a period of many years.* The

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* Representative decisions of the Oklahoma Supreme Court are reported in:

Wilson v. *C.R.I.&P. R. Co.*, 429 P. 2d 763 (Okl. 1967); *M-K-T R. Co.* v. *French*, 368 P. 2d 652 (Okl. 1961); *Atchinson, T.&S.F. Ry. Co.* v. *Raleigh*, 194 Okl. 589, 154 P. 2d 62 (1944); *Kugler* v. *White*, 91 Okl. 130, 216 Pac. 903 (1923); *M.K.&T. Ry. Co.* v. *Raines*, 59 Okl. 52, 158 Pac. 936 (1916); *Missouri, O. & G. Ry. Co.* v. *Parker*, 50 Okl. 491, 151 Pac. 325 (1915).

court below reaffirmed its long followed application of this statute in *Wilson* v. *C.R.I. & P. R. Co.*, 429 P. 2d 763, decided only three months prior to the decision here sought to be reviewed.

Plaintiff Kiser failed to meet the statutory requirement that he *prove* petitioner did not sound either a whistle or a bell. Plaintiff sought by four witnesses to establish that no "whistle" had been sounded by defendant's train prior to his injury, but failed to show by these witnesses or by any others, and did not even inquire of them, whether a "bell" had been rung. Relying upon the consistent application of the statute by the Oklahoma Supreme Court, defendant filed a demurrer to such evidence, which was overruled by the court.

The Supreme Court of Oklahoma in disposing of defendant's appeal failed and refused to apply the requirements of the above-quoted state statute in the same impartial manner as it had so recently done in *Wilson* v. *C.R.I. & P. R. Co.*, 429 P. 2d 763, and as it had done in suits involving all other railroads since the statute was enacted. The statute is so clear and unambiguous as not to permit a different application to petitioner from that consistently applied by the Court in all other cases involving the same statute. The federal constitutional questions sought to be reviewed were raised in the court below on petition for rehearing (Amendment to Second Petition for Rehearing, Appendices C and D). The court denied petitioner's petition for rehearing and amendment thereto by order entered January 26, 1968. (Appendix E). In so doing and in failing to accord to petitioner the same rights and defenses under the statute which it has accorded to all other railroads operating in the State of Oklahoma, the Supreme Court of Oklahoma denied to petitioner the rights guaranteed to it by the Fourteenth Amendment to the Constitution of the United States. The opinion of the court below affirming the judgment in favor of plaintiff Kiser against petitioner,

contained in Appendix A, infra, did not overrule its previous decisions involving this Oklahoma statute; it arbitrarily permitted plaintiff in this case to recover a judgment against this petitioner without requiring the proof that is required by the statute. In so doing the court below arbitrarily so applied the statutory requirements to petitioner as to single out, discriminate against and impose on petitioner different legal duties and obligations under the statute than are imposed by that court on other railroads under the same statute under the same or similar circumstances.

REASONS FOR GRANTING WRIT

It is respectfully submitted that this petition for a writ of certiorari should be granted for each of the following reasons:

I.

There can be no doubt as to the intendment of the applicable Oklahoma Statute, Section 126, quoted in full above, or the long followed application of said statute by the Oklahoma Supreme Court. Without a single departure until the present suit, the court below has followed the same decisional basis, i.e., that one complaining of a violation of this statute must *prove* that the railroad complained of *neither* blew the engine whistle *nor* rang the engine bell. As recently as three months prior to the decision herein, the Oklahoma Supreme Court reaffirmed this application, stating:

> "In connection with the alleged failure to sound the whistle, plaintiff says that 'a minimal requirement of statute and case law in the operation of a train is the sounding of a whistle 1320 feet before reaching a crossing' and argues that 'the testimony of Mr. Roberts (the refinery employee), *standing alone, and with nothing else*, was sufficient to take the case to the jury'.

> "We are unable to agree. In passing, we note that the statute, 66 O.S. 1961, § 126, requires only the sounding of the bell *or* the whistle. *As we have seen, there was no evidence that the bell was not sounded.*" (*Wilson* v. *C.R.I. & P. R. Co.*, 429 P. 2d 763, 766). (emphasis supplied).

Thus every railroad, except petitioner in this case, has been accorded the judicially sanctioned right to comply with the said statute by one of two alternative methods of warning. But petitioner, for no known reason, under the same statute and under the same or similar circumstances, has been held civilly liable on a jury finding that it had failed to comply with one of the two alternative methods, i.e., the failure to blow the engine's whistle. The jury could make no finding with respect to whether the engine's bell had been rung since no evidence was presented on this point.*

The question here presented resulting from the Oklahoma Court's refusal to accord to petitioner the same rights and defenses in the suit below that it has accorded at all other times to all other railroads under the same or similar circumstances is one involving the fair and impartial application of a statute which on its face is fair, unambiguous and constitutionally sound. The vice of the decision below lies not in the statute itself but rather in the unequal, arbitrary and patently discriminatory application of said statute to petitioner in a manner wholly different from its application to all other railroads. This Court has often held that though a state statute be fair and impartial on its face, the protection of the Fourteenth Amendment is not

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* While the court below suggests that the finding of the jury includes an inference that there was no signal, including the ringing of a bell, there is no evidence on which such an inference or finding could be made. As stated by the Court in *Wilson* v. *C.R.I.&P. R. Co., supra,* "* * *. there was no evidence that the bell was not sounded".

to be immunized by the unequal and discriminatory application of such statute in a different way to different persons. The language of this Court in *Yick Wo* v. *Hopkins*, 118 U.S. 356, 373, is explanatory of the principle petitioner here relies on and believes controlling on this question:

> "Though the law itself be fair on its face and impartial in appearance, yet if it is applied and administered by public authority with an evil eye and an unequal hand so as to practically make unjust and illegal discriminations between persons in similar circumstances * * * the denial of equal justice is still within the prohibition of the Constitution".

Where a court, as here, through arbitrary application of a statute lays an uneven hand on those who have conducted themselves in the same manner and finds one liable and not the other, it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment.

The judgment of the court below is squarely in conflict with the principle announced by this Court in *Yick Wo* v. *Hopkins*, *supra*, which has been followed in innumerable subsequent cases. See *Griffin* v. *Illinois*, 351 U.S. 12, 17; *N.A.A.C.P.* v. *Alabama*, 377 U.S. 288, 295, 301; *Swain* v. *Alabama*, 380 U.S. 202, 223; *U. S.* v. *Louisiana*, 380 U.S 145, 154; *Reitman* v. *Mulkey*, 87 Sup. Ct. 1627, 1631.

The recent civil rights decisions embodied in the cases last cited have, we believe, given new strength and vitality to judicial enforcement of this principle. This Court also has long recognized and applied this principle to the protection of business and property holders who have been denied equal protection of the law in the operation of their business or the ownership and use of their property. Thus, in *Cotting* v. *Kansas City Stockyards Company*, 183 U.S. 79, 112, this Court refused to enforce a state statute discriminating against one company solely because of its size, stating: "* * * equal protection is denied

when upon one of two parties engaged in the same kind of business and under the same conditions burdens are cast which are not cast upon the other". And in *Oyama* v. *California*, 332 U.S. 633, 645, this Court refused to permit a burden of proof to be judicially imposed on one property holder resulting from statutory construction and application which was not also imposed on other property holders, finding such burden was clearly discriminatory. The reasoning on which this principle is based is unassailable; there can be no equality of different persons before a court of law if a statute, fair and impartial on its face, is applied to one person one way and in a totally different way to other persons in the same or similar circumstances.

It would be difficult to find a clearer example of an unequal and patently discriminatory application of a statute than that revealed by a comparison of *Wilson* v. *C.R.I. & P. R. Co.*, 429 P. 2d 763, and the decision here in *M-K-T* v. *Kiser*: both cases involve the same court; the same statute; the same type of action (suit to recover damages for personal injuries); a single vital issue (whether a bell or whistle had been sounded); and the same identical procedural basis (demurrer to the evidence). In the *Wilson* case the court below held that absent proof of failure to sound the engine bell as well as the engine whistle, the demurrer to the evidence must be sustained. In the instant *Kiser* case, decided only three months later, the court below refused to sustain petitioner's demurrer despite the absence of evidence required by the statute and imposed liability on petitioner. The Equal Protection Clause of the Fourteenth Amendment forbids such selective inequality in the application of a statute.

This Court has long recognized that judicial action by a state, as well as legislative and executive action, is in all respects subject to the requirements of the Fourteenth Amendment since those requirements apply to exertions of state power in all forms. And this is true even though the statute enforced by judicial action is on its face

or by its terms impartial and equally applicable to all. Three quarters of a century ago this Court stated: "But it must be observed that the prohibitions of the amendment (Fourteenth) refer to all the instrumentalities of the State, to its legislative, executive and judicial authorities * * *". *Chicago, Burlington & Quincy R. Co.* v. *Chicago*, 166 U.S. 226, 233. A more complete historical review of this principle is found in *Shelley* v. *Kraemer*, 334 U.S. 1, 18, in which this Court stated:

> "The short of the matter is that from the time of the adoption of the Fourteenth Amendment until the present, it has been the consistent ruling of this Court that the action of the States to which the Amendment has reference, includes action of state courts and state judicial officials."

The arbitrary refusal of the Oklahoma Supreme Court to apply its prior settled law under this statute to petitioner is not a mere trial error; it is a denial of equal protection of the law. There is no evidence here that petitioner did not sound its engine bell or that the witnesses did not hear the bell. When a plaintiff fails to make his proof under the statute, the court below cannot set aside the statutory requirements of proof and cure the error by conjecture. The offhand suggestion of the court below that if there is evidence that the witnesses did not hear one signal, it can be inferred that the railroad did not sound another signal, does not meet the requirements of the law as consistently applied by the court below in all other cases. See *Wilson* v. *C.R.I. & P. R. Co.*, *supra*. If this arbitrary application of the statute is permitted, the court below can grant or deny liability of its own choosing in every case under color of law.

This Court has long recognized that "* * * a denial of constitutionally protected rights demands judicial protection." *Reynolds* v. *Simms*, 377 U.S. 533, 566. The action of the court below in singling out and imposing a judgment of liability against petitioner and judgments

of no liability under the same statute as to other railroads is a classic invidious discrimination. Here petitioner and other railroads are charged under the same statute with the same duties under the same or similar circumstances subject to the same penalties in the same state. It is axiomatic that all persons are equal before the law and are entitled to the same rights under the law under the same or similar circumstances.

The constitutional principle of equality under the law is of fundamental importance, regardless of the type of action in which it is raised, whether in a criminal proceeding, in suits to protect civil rights, or, as here, in a suit based on tort in which petitioner seeks protection against an invalid and unlawful judgment. Your petitioner is also entitled to the protection of the Fourteenth Amendment and should not be denied its rights merely because it is a railroad and a foreign corporation in the state in which the suit was instituted and judgment rendered. When an otherwise valid statute is applied in an unconstitutional manner, such application should not be permitted to stand.

II.

There is no evidence to support the judgment of the court below and such judgment should be set aside because of a denial of due process of law. As heretofore stated, plaintiff Kiser submitted evidence only as to a whistle. He did not present or even attempt to present any evidence whatsoever with respect to whether or not the Railroad's engineer rang the engine bell. But evidence of petitioner's failure to sound alternative warnings, neither a whistle nor a bell, is under the Oklahoma statute a necessary and mandatory part of plaintiff's burden of proof to support a judgment. Because of plaintiff's failure of proof, the judgment imposed on petitioner, now affirmed by Oklahoma's highest court, is unsupported

by evidence, unjust and a denial to petitioner of due process of law.

Under the "due process" requirement of the Fourteenth Amendment no judgment or order may be sustained if not supported by substantial evidence. This principle is so firmly established that it requires little discussion:

I.C.C. v. *Louisville & Nashville R. Co.*, 227 U.S. 88, 91;
Postal Telegraph Cable Co. v. *Newport*, 247 U.S. 464, 473;
Morgan v. *U. S.*, 298 U.S. 468, 480;
Ohio Bell Telephone Co. v. *Commission*, 301 U.S. 293, 302;
Railroad Commission v. *Pacific Gas & Electric Co.*, 302 U.S. 388, 393;
United States ex rel Vajtauer v. *Commissioner*, 273 U.S. 103, 106;
Brown v. *Mississippi*, 297 U.S. 278;
Tot v. *United States*, 319 U.S. 463, 473, (concurring opinion of Mr. Justice Black);
Schware v. *Board of Bar Examiners*, 353 U.S. 232, 247;
Thompson v. *Louisville*, 362 U.S. 199, 204;
Garner v. *Louisiana*, 368 U.S. 157, 163;

The judgment here sought to be reviewed is in conflict with the many decisions above cited.

The opinion of the court below implies that where plaintiff's evidence did not meet the statutory requirement in that it related only to a whistle, the court and the jury could infer that petitioner did not sound its bell. Such an inference is wholly without foundation in the record. The transcript of evidence in the trial court shows unequivocally that not a single witness testified as to whether or not a bell was rung. There being no evidence, neither the court nor the jury could make a finding as to the sounding of a bell. Plaintiff below having failed completely to tender any evidence on this vital part

of his proof, the judgment of the court below is unsupported by evidence and defendant's demurrer to the evidence should have been sustained. The failure and refusal of the court below to sustain defendant's demurrer denied to this petitioner the protection afforded it by the due process clause of the Fourteenth Admendment.

III.

The discriminatory application of the state statute by the Supreme Court of Oklahoma, as above set forth, has rendered Section 126 of Title 66 Oklahoma Statutes invalid under the Fourteenth Amendment to the Federal Constitution. See *Concordia Fire Insurance Company* v. *Illinois*, 292 U.S. 535, 545; *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 726 (concurring opinion of Mr. Justice Stewart); *Reitman* v. *Mulkey*, 87 Sup. Ct. 1627. Being invalid, the judgment against petitioner based on that statute is likewise invalid. A statute rendered null and void by an application prohibited by the Fourteenth Amendment will not support a judgment. Compare *Frost* v. *Corporation Commission*, 278 U.S. 515; *McLaughlin* v. *Florida*, 379 U.S. 184; *Cox* v. *Louisiana*, 379 U.S. 536. Accordingly, the judgment against petitioner is invalid and should be reversed.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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